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# In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 912

HAROLD T. GRISWOLD, W. W. S. CARPENTER, AND Laird Bell, Executors of the Estate of William H. Redington, Deceased, petitioners

*v.*

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 15–19) is reported in 23 B.T.A. 635. The opinion of the Circuit Court of Appeals (R. 31–37) is reported in 62 F. (2d) 591.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 26, 1932 (R. 38). A petition for rehearing was denied January 28, 1933 (R.

38–39). The petition for a writ of certiorari was filed April 26, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether there should be included in the gross estate of a decedent dying after the effective date of Section 402 (d) of the Revenue Act of 1921 one-half the value of property acquired by the decedent and his wife as joint tenants prior to September 8, 1916, the effective date of the first Federal estate tax statute.

## STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 7–10.

## STATEMENT

The facts were stipulated and were found by the Board of Tax Appeals as follows:

William H. Redington died a resident of Evanston, Illinois, on October 8, 1923, and was survived by his wife, Frances A. Redington (R. 15).

On or about October 5, 1909, the decedent conveyed, through an intermediary, to himself and his wife, as joint tenants and not as tenants in common, certain real estate situated in Evanston, Illinois, and used by them as a homestead. Under the laws of Illinois title to the property vested, upon delivery of the deed, in the decedent and his wife as joint tenants with the right of survivorship. Frances A.

Redington made no contribution at any time to the cost of the real estate. (R. 15.)

The Commissioner included the entire value of the real estate in the decedent's gross estate as subject to tax (R. 13–14). The Board of Tax Appeals determined that only one-half the value of the property was taxable (R. 19), and both parties sought review. The Commissioner's appeal was subsequently dismissed on his motion (R. 35). On the taxpayer's appeal, the court below affirmed the decision of the Board of Tax Appeals (R. 35–37).

## ARGUMENT

The estate taxing statute imposes a tax at death and can only attach where there is a taxable event at that time. That event need not be an actual transfer of the property. It is sufficient if the fact of death brings into being or enlarges property rights for the survivor so as to make appropriate the imposition of the tax. This principle is established by this Court's decision in *Tyler* v. *United States*, 281 U.S. 497, where the full value of propery held by the decedent as a tenant by the entirety was held subject to the estate tax under the Revenue Acts of 1916 and 1921.

In the *Tyler case*, the several estates involved had all been created after the enactment of the statutes under which it was sought to impose the tax. But the decision was based on the ground that there was a taxable event at death. See *Lang* v. *Commissioner*, No. 595, October Term, 1932, de-

cided April 10, 1933. Consequently the date of creation of the estate was immaterial. This view of the *Tyler case* found confirmation in the later decision of *Third National Bank & Trust Co.* v. *White,* 287 U.S. 577, where the full value of an estate by the entirety was held taxable although the tenancy was created, as here, before the first estate tax statute. The petitioner does not suggest that tenancies by the entirety and joint tenancies are to be differently treated in this respect. In the case of *Commissioner* v. *Emery,* 62 F. (2d) 591, decided with the present case, the court below clearly indicated that in its opinion there was no basis of distinction between the two types of tenancy. The statutes and decisions support this view.

If, as this Court has held, there is a taxable event at death, it is not significant that the Revenue Act of 1921 contains no language which is specifically retroactive. The Revenue Act imposes a tax, and the conditions which call for the imposition of the tax are met by the death of the decedent after the effective date of the statute.

The various expressions of this and other courts invoked by the petitioners do not seem conclusive here. In *Knox* v. *McElligott,* 258 U.S. 546, the Commissioner sought to include the full value of property jointly owned. The taxpayer had conceded that one-half of the value of the property was taxable, and this Court held that no amount in excess of half could properly be included. Since only one-half of the value of the property has been taxed here, the decision in *Knox* v. *Mc-*

*Elligott* is not in point. *Shwab* v. *Doyle,* 258 U.S. 529, related to a transfer which was sought to be included in the gross estate under a provision of the Revenue Act of 1916 imposing a tax upon property transferred in contemplation of death. This Court decided that the statute should not be applied to transactions completed before the Act became a law. Under the circumstances of that case there was no taxable event at death.

*Walker* v. *Grogan,* 283 Fed. 530 (E.D. Mich.), affirmed *per curiam,* 300 Fed. 1004 (C.C.A. 6th), *Lynch* v. *Congdon,* 1 F. (2d) 133 (C.C.A. 8th), and *Carter* v. *English,* 15 F. (2d) 6 (C.C.A. 9th), were decided long prior to the decision of this Court in *Tyler* v. *United States, supra. Walker* v. *Grogan* held that but one-half of the value of jointly owned property was taxable and is therefore not inconsistent with our present position. *Lynch* v. *Congdon* was in effect overruled by the same court in *Whitehead* v. *Commissioner,* decided March 20, 1933, not yet reported. The *Whitehead* decision is direct authority in support of our position. *Carter* v. *English* was definitely repudiated by the court which decided it in *Gwinn* v. *Commissioner,* 54 F. (2d) 728 (C.C.A. 9th), affirmed by this Court, 287 U.S. 224. In *Hernandez* v. *Becker,* 54 F. (2d) 542 (C.C.A. 10th), the court decided that a community estate was neither a joint tenancy nor a tenancy by the entirety. The force of the opinion is to some extent weakened by the court's reliance upon the doubtful authority of *Carter* v. *English* and *Lynch* v. *Congdon,* both *supra,* together with

*Estate of Gurnsey,* 177 Cal. 211, disapproved by this Court in *Gwinn* v. *Commissioner, supra,* pp. 226–227. The only decision among the later cases which we find inconsistent with the judgment below is that of the District Court for the Northern District of Illinois in *Kaufman* v. *Reinecke,* decided January 19, 1933, not yet officially reported. This case was apparently decided without knowledge of the present decision, which should have controlled the District Court.

## CONCLUSION

The decision of the court below appears to be correct. There seems to be no conflict of decisions requiring review. The question is one which does not arise under the Revenue Acts subsequent to that of 1921 and the controlling principles have been settled by this Court. The petition for certiorari should be denied.

Respectfully submitted.

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MAY 1933.

# APPENDIX

## STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 278:

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * *

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so ac-

quired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;

* * * * *

Treasury Regulations 63, promulgated under the Revenue Act of 1921:

ART. 23. *Property held jointly or as tenants by the entirety.*—The statute provides for the inclusion in the gross estate of interests held jointly by the decedent and any other person or persons, and of estates by the entirety. This class of property includes all interests, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purposes of administration. It does not include interests held as tenants in common, where the interest of each tenant passes free from any right of survivorship.

The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to either or the survivor; and, in general, all securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship.

ART. 24. *Taxable portion.*—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of

funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

T.D. 3951, VI-1 Cumulative Bulletin 314:

Article 27 of Regulations No. 37 (revised January, 1921), and article 23, Regulations No. 63, are hereby amended to read as follows:

*Property held jointly or as tenants by the entirety.*—The statute provides for the inclusion in the gross estate of interests held jointly by the decedent and any other person or persons and of estates by the entirety. This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death. This class of property includes all interests, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purpose of administration. It does not include interests held as tenants in common where the interest of each tenant passes free from any right of survivorship.

The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to either or the survivor; and, in general, all

securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship.

These amendments apply only to the estates of decedents who died prior to the effective date of the Revenue Act of 1924.

D. H. BLAIR,
*Commissioner of Internal Revenue.*

Approved December 29, 1926.

A. W. MELLON,
*Secretary of the Treasury.*

T.D. 4293, IX-2 Cumulative Bulletin 425:

Article 27 of Regulations 37 (revised January, 1921), and article 23, Regulations 63, as amended by Treasury Decision 3951, are hereby amended by striking out the following sentence:

"This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death."

ROBT. H. LUCAS,
*Commissioner of Internal Revenue.*

Approved July 3, 1930.

A. W. MELLON,
*Secretary of the Treasury.*

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